



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 160 of 1995

MICHAEL MUTUA MUTISYA PLAINTIFF

- Versus -

RAMESH KAKUBHAI DEFENDANT

Coram: Before Hon. Justice Mwera

Wanyonyi for plaintiff

Okongo for defendant

Court clerk – Kazungu

J U D G M E N T

In the plaint filed here on 7/5/1995, the plaintiff averred that on 6/2/1995, the defendant or his agent/driver drove his motor vehicle registration No. KAD 177B lorry so negligently along Jomo Kenyatta Avenue Mombasa, that he knocked down and injured the plaintiff who was riding a bicycle on his left side of that road. The particulars of negligence included driving at an excessive speed in the circumstances and without due care and attention, to other road users like the plaintiff. That the defendant's lorry was driven in a zig zag manner and its driver did not notice the plaintiff or do so much as to slow down, brake or in any way avoid causing the accident. That the plaintiff suffered a crush injury to the right arm leading to amputation above the elbow, laceration to the back side and bruises to both knees. So he prayed for damages, costs and interest.

The defence dated 21/3/1995 denied that the subject accident was due to the negligence of the defendant or his driver/agent. But that the plaintiff wholly or substantially contributed to it by suddenly riding into the path of the defendant's motor vehicle without keeping a proper look –out. That he did so at a high speed and took no action to avoid colliding with the subject motor vehicle.

It does not appear that the plaintiff filed a reply to the defence (see O6r.9 CPR) but seven (7) agreed issues were placed on the record on 19/3/1997.

The plaintiff (P.W.1) gave evidence on 22/10/1998 that he was riding a bicycle from the direction of a place called Sparki towards a market known as Segga. When he got to some traffic lights at a junction called Saba Saba, he stopped when the RED sign showed. He was on his left side of the road. But then that lorry which had been following him from Nyali Bridge direction (KAD 177B) hit the plaintiff's front tyre. He fell down and the lorry crushed his right arm. It had to reverse in order to get the plaintiff to be picked up and rushed to Coast General Hospital. He was admitted there and his arm was amputated. A

P3 form was filled (Exh P1). Doctors Khandwalla and Mr. Patel examined P.W.1 and tendered reports. He paid them Sh. 2000/= and Sh. 1,500/= respectively (Exh P3 (a) (b)) P.W.1 maintained that he was in front of the lorry at the traffic lights. That he worked as a licenced taxi driver (ExhP6) earning between Sh. 5,000/= and Sh. 6,000/= per day. He could no longer do the driving. That he, as a driver, P.W.1 knew the road signs; he stopped at this point with a view to ride straight on. He was in his proper lane. P.W.1 could not show evidence that he hired taxis to drive, make some Sh. 5,000/= or 6,000/= per night, pay the taxi driver Sh. 1,000/= and pocket the rest.

Mr. Hermat Patel (P.W.2) a doctor examined the plaintiff on 28/3/1995 just after about a month since the accident of 2/2/1995. He said that P.W.1 sustained serious crush injury to the right arm that required amputation. He also suffered contusion of the chest and abrasions on the back; that P.W.1 was in hospital for 32 days and he lost the right arm permanently. Thus he could not drive any more (Exh P4). That closed the plaintiff's case.

The defence called one witness I.P. Ngoni (D.W.1) to produce records from the Traffic Department Mombasa Central Police Station. D.W.1 told the court that he investigated the accident, at the place and time set out above involving the plaintiff and the defendant's motor vehicle Reg. No. KAD 177B lorry. D.W.1 recorded the statements from the lorry driver and the cyclist (the plaintiff) and had in the record a sketch plan drawn at the scene and the inspection report of the lorry . The whole file was produced (Exh D1). That the inspection report noted some minor pre-accident marks on the lorry that did not contribute to the subject accident. That the investigations were never concluded and it was thus not remarked as to whom of the two – the lorry driver and the cyclist, was probably to blame.

In cross-examination, it transpired that D.W.1 was not the one who investigated this accident and he did not visit the scene either. His officers did that. The lorry driver was not traced to testify and that closed the trial. Each side submitted.

Mr. Wanyonyi's position was that the defendant ought to bear 100% liability because the plaintiff's evidence remained unchallenged. This court agrees. P.W.1 told the court that he had stopped at the traffic lights at Saba Saba waiting to proceed straight on. He kept his correct lane then the defendant's lorry which had been following him hit him and he was injured.

On damages the court was told that with the amputation of his right arm the plaintiff would no longer work as a driver earning between Sh. 5,000/= and Sh. 6,000/= per day. Although he exhibited his driving licence there was nothing to show that the plaintiff earned that much as a taxi driver. It was however proposed that P.W.1 get Sh. 1.5m for pain and suffering, special damages Sh. 191,750/=, domestic help Sh. 300,000/= and loss of earning capacity based on Sh. 5,000/= per day over a multiplier of 15, on account of the plaintiff having been injured at age 23. It should be remarked upon right away that proof of the claimed total special damages and expenses for domestic help did not feature in P.W.1's evidence or otherwise. The plaintiff however cited the cases of DAVID TARUS SAMUEL VS TANA RIVER EXPRESS & 3 OTHERS HCCC 721/1992 (MBA) and HASSAN NGONJA VS PWANI WINES & SPIRITS LTD. HCCC 720/1991 (MBA) to support the reliefs sought.

On behalf of the defendant, it was said that the plaintiff did not file a reply to the defence and thus what the defendant pleaded remained. That could have been so had the defendant called evidence to support his claim on contributory negligence. Merely pleading but nor supporting that with evidence did not amount to much. Submissions cannot take the place of evidence if the latter was not adduced. The defendant did not call evidence to tell its side of the story at the said Saba Saba traffic lights and how the accident took place. Submissions will not replace this.

The court was told that there was no evidence of the plaintiff earning Sh. 5,000/= - 6,000/= per day or for Sh. 300,000/= for domestic help. But that a rate of Sh. 2,885/= per month was reasonable.

A sum of Sh. 350,000/= was found reasonable for pain and suffering. The cases of FATUMA SALIM VS YUNUS OMAR & ANOR. MBA HCC 583/1985 and MONICA MBURU VS KURIA NJOROGI HCCC 73/1986 were cited. Therein damages for pain and suffering in similar circumstances

attracted awards of Sh. 350,000/= and Sh. 270,000/= respectively. The case of Hassan Ngonja (above) was closely looked at and found to have an award of Sh. 490,000/= for pain suffering and loss of amenities and no more.

The defence further submitted, and the court has already noted above, that there was no proof for Sh. 791,750/= (special damages) or the costs for the police abstract X-rays etc. That no evidence was also led about the artificial limb (prosthesis). That the plaintiff's name did not feature in the bicycle receipt (produced?) and that someone else did. That a total of Sh. 2,265/= only had been proved in special damages and it should be awarded. The defence said nothing of lost earning capacity.

In this court's view, having settled all liability against the defendant, the next is to assess damages.

(a) Special Damages:

The plaintiff was able to adduce evidence for a sum of Sh. 3,130/= (drugs, medical report and police abstract) that is awarded.

(b) General Damages:

(i) Pain & Suffering:

The plaintiff suffered a crushed right arm which was amputated below the elbow. It is a total loss and he cannot drive any more. For that and considering the authorities cited and passage of time the plaintiff gets Sh. 400,000/=

(ii) Loss of Earning Capacity

The plaintiff held a driving licence. Although he did not show evidence of his earnings, the defence thought Sh. 2,885/= was a reasonable income per month and this court agrees. Plucked from the air yes, but a reasonable rate in the circumstances. Allowing for the uncertainties in life or even in the driving industry, this court adopting a multiplier of 10, awards a total of Sh. 346,200/= to the plaintiff for loss of earning capacity (2885 x 10 x 12).

The total award is:

Special Damages	-	Sh. 3,130/=
General Damages		
Pain & Suffering	-	Sh. 400,000/=
Loss of Earning Capacity	-	<u>Sh. 346,200/=</u>
Total		<u>Sh. 749,330/=</u>

(Shillings Seven hundred forty nine thousand three hundred and thirty)

The plaintiff also gets costs and interest on the lower court rates.

Judgment accordingly.

Delivered on 30/11/2005.

J.W. MWERA

JUDGE